

REMARKS

Claims 1-33 are pending in the Application.

Claim 33 is allowed.

Claims 1-7, 10-16, 19-25 and 28-32 stand rejected.

Claims 8, 9, 17, 18, 26 and 27 stand objected to.

I. ALLOWABLE SUBJECT MATTER

Claim 33 is allowed. Claims 8, 9, 17, 18, 26 and 27 are objected to as being dependant upon a rejected base claim, would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Accordingly, the Applicants have rewritten claims 8, 9, 17, 18, 26 and 27 in independent form, incorporating all of the limitations of the respective base claims and any intervening claims. The Applicants appreciate the allowance of claim 33 and claims 8, 9, 17, 18, 26 and 27.

II. REJECTION UNDER 35 U.S.C. § 102

Claims 1-7, 10-16, 19-25 and 28-32 have been rejected under 35 U.S.C. § 102 as being anticipated by *Miller, et al*, U.S. Patent No. 5,920,701 ("Miller"). The Applicants respectfully traverse the rejection of claims 1-7, 10-16, 19-25 and 28-32 under 35 U.S.C. § 102.

Claim 1 has been rewritten hereinabove to clarify the claim language. The Applicants respectfully assert that the scope of the claim is unchanged, and therefore, the Applicants respectfully assert that the amendment to claim 1, and incorporated by reference in any claims depending therefrom are not narrowing amendments made for a reason related to the statutory requirements for a patent that give rise to prosecution estoppel. *See Festo Corp. v. Shoketsu Kinzoku Gogyo Kabushiki Co.*, 122 S. Ct. 1831, 1839-40, 62 U.S.P.Q. 2d 1705, 1711-12 (2002); 234 F3d 555, 566, 56 U.S.P.Q. 2d 1865, 1870 (Fed. Ct. 2001).

As rewritten herein, claim 1 is directed to a method of servicing a network request. The method includes determining availability of resource capacity in response to a network request for data from the server, received from a client, and allocating a scheduled time for resending the network request to the server by the client. *Miller* is directed to scheduling requests to send data from content sources to replicated servers. (*Miller*, column 1, lines 57-60.) Considering first the step of allocating a scheduled time for resending the network request to the server, *Miller* allegedly teaches the allocating step by disclosing that the scheduler of *Miller* determines an available transmission time for each content source, which is a time interval starting with the time that transmission is to commence and ending with the requested delivery time (Paper No. 8, page 2) (citing *Miller* at column 7, lines 54-56). Note that the transmission referred to in this teaching pertains to the transmission of content by the content source to a recipient, namely, a replicated server. (*Miller*, column 7, lines 15-53.) Thus, the teaching which is asserted to disclose the step of allocating a scheduled time to resend a network request, has nothing to do with a resending of a network request, but refers to a transmission time for the delivery of content which *Miller* expressly teaches as a time interval that begins with the time that the transmission is to commence (based on the amount of time needed to deliver the content) and ends with the requested delivery time (that is the time that the content that is requested to be delivered by the content source). (*Miller*, column 7, lines 15-56.) Additionally, the teaching that allegedly discloses resending a network request states, in fact, that if a request cannot be accommodated, the scheduler notifies the content sources that their request (for bandwidth to transmit the content as previously discussed) will not be accommodated at all or will be only partially accommodated, and the scheduler may further indicate to the content sources that they should request a new delivery time. (*Miller*, column 12, lines 9-20.) Those content sources that have been notified on non-accommodation determine whether the notification is acceptable, and if so, they signal the scheduler that the request can be put on hold. (*Miller*, column 12, lines 21-24.) Thus, this teaching, upon which the Examiner relies, has nothing to do with resending a network request by a client requesting service, as recited in claim 1.

Anticipation requires that a single prior art reference teach the identical invention as recited in the claim. MPEP § 2131. In other words, a single reference must teach all of the limitations of the claim, arranged as required by the claim. *Id.* To the extent that the teaching in *Miller* referred to above discloses allocating a scheduled time, it is an allocation of the scheduled time for a content source to send data to a recipient, particularly a replicated server. Thus, this teaching does not disclose allocating a scheduled time to resend a network request. Furthermore, the teaching in *Miller* which is alleged to disclose resending a network request refers to the setting of a desired delivery time by the content source. (Paper No. 8, page 2) (citing *Miller*, column 6, lines 24-29). The content source setting a desired delivery time cannot be a step of allocating a scheduled time which *Miller* teaches as being performed by the scheduler, as discussed above. Additionally, although not cited by the Examiner, this *Miller* further teaches that the central processor at each content source is configured to transmit a request signal at a time prior to the desired delivery time, thereby giving the scheduler enough time to receive the request, make appropriate determinations and notify the content source as to whether the request can be accommodated. (*Miller*, column 6, lines 28-34.) In sum, *Miller* teaches that a content source requests a desired delivery time for transmitting information to a replicated server, for example, when the replicated server requires data updates, and a scheduler determines if the request can be accommodated. (*Miller*, column 6, lines 8-34.) The scheduler then determines for each source the available transmission time, as previously described. (*Miller*, column 7, lines 15-56.) (Note, also, that the scheduler of *Miller* is not a server, however, the Applicants need not rely on this in view of the foregoing; because *Miller* does not teach allocating a scheduled time to resend a network request *Miller* cannot anticipate claim 1, regardless of which component in *Miller* allegedly performs the operation.) Nothing in these teaches discloses a step of allocating a scheduled time to resend the network request, as recited in claim 1. Consequently, *Miller* has not been able to teach the identical invention of claim 1. Thus, *Miller* does not anticipate claim 1, and claim 1 is allowable under 35 U.S.C. § 102 over *Miller*.

Claims 10 and 19, directed to a data processing system and computer program product have been rejected on the same basis as claim 1 as reciting limitations paralleling the limitations of claim

1. (See Paper No. 8, page 2.) Consequently, these claims are also allowable under 35 U.S.C. § 102 over *Miller* for at least the reasons discussed in conjunction with claim 1.

Claim 28 is directed to a data processing system including a network, a client coupled to the network and a server coupled to the network. Additionally, the client includes circuitry operable for sending a request for delivery of software assets over the network to the server wherein the server includes circuitry operable for scheduling the request for delayed servicing in response to insufficient system capacity and circuitry for sending a notification to the client to resend the request according to the scheduling. Claim 28 has been rejected on the same basis as claim 1. (Paper No. 8, page 2.) The Applicants showings above in conjunction with claim 1 are also applicable to claim 28. Additionally, the Applicants also note that the Examiner identifies the content sources as taught in *Miller* with the client in rejecting claim 30, which depends from claim 28, as discussed below. Plainly, the content sources of *Miller* do not send a request for delivery of software assets as recited in claim 28. To the extent that *Miller* discloses delivery of software assets over a network at all (which the Applicants do not admit), it is the content sources that deliver such resources. Thus, the "clients" as identified in *Miller* do not disclose a client as recited in claim 28. For at least this reason as those discussed in conjunction with claim 1, *Miller* does not anticipate claim 28. Therefore, claim 28 is allowable under 35 U.S.C. § 102 over *Miller*.

Claim 29 recites the data processing system claim 28 in which the request is scheduled for servicing at a preselected time. Claim 29 has also been rejected on the same basis as claim 1. (Paper No. 8, page 2.) *Miller* teaches a scheduler allocating network bandwidth to content sources based on requests for data transmission to \_\_\_\_\_ replicated servers from the content sources. (*Miller*, column 1, lines 57-60.) Thus the requests as taught by *Miller* are seen not to be requests from a client for the delivery of software assets scheduled for servicing at a preselected time. Because *Miller* does not teach the identical invention of claim 29, *Miller* does not anticipate claim 29. Therefore, claim 28 is allowable under 35 U.S.C. § 102 over *Miller*.

Claim 2 depends from claim 1 and recites the method thereof in which the step of allocating a scheduled time includes selecting the scheduled time, and notifying the client to resend the network

request at the scheduled time. As discussed above, the teaching alleged to disclose resending a network request states that if the non-accommodation is acceptable, the content sources (identified as the clients) signal the scheduler that the request can be put on hold. (*Miller*, column 12, lines 24-29.) The content sources, which have been identified as the clients as recited in claim 2 through the dependency from claim 1, obviously do not notify themselves to resend a network request at a scheduled time. *Miller* does not so teach, rather *Miller* teaches that the content sources signal the scheduler that the request (for network bandwidth) can be put on hold. Signaling that a request can be put on hold, is not notifying a client to resend a network request at a scheduled time. (*Miller* teaches that a scheduler may indicate to a content source that cannot be accommodated or only partially accommodated that the content source should request a new delivery time. *Miller*, column 12, lines 19-20.) This, again, by the plain terms of the teaching does not disclose notifying a client to resend the network request at a scheduled time. Moreover, as discussed in conjunction with claim 1, that to the extent *Miller* teaches selection of a time slot, it is the selection of the time for transmitting data from the client source to a replicating server, not allocation of a time to resend a network request. For at least these reasons, *Miller* does not teach the identical invention of claim 2. Thus, *Miller* does not anticipate claim 2 and claim 2 is allowable under 35 U.S.C. § 102 over *Miller*.

Claims 10 and 19, directed to a data processing system and computer program product have been rejected on the same basis as claim 2 as reciting limitations paralleling the limitations of claim 2. (See Paper No. 8, page 2.) Consequently, these claims are also allowable under 35 U.S.C. § 102 over *Miller* for at least the reasons discussed in conjunction with claim 2.

Claim 30, directed to the data processing system of claim 28 in which the client further includes circuitry operable for resending the request in response to the notification (recited in claim 28), has been rejected on the same basis as claim 2. (Paper No. 8, page 2.) As previously discussed, claim 2 recites the step of allocating a schedule time comprises selecting the schedule time and notifying the client to resend the request. Claim 30 does not refer to circuitry operable for performing these operations, but to circuitry operable for resending the request. Thus, *Miller* has

not been shown to teach the identical invention as claim 30. Consequently, claim 30 is allowable under 35 U.S.C. § 102 over *Miller*.

Claim 3 depends from claim 2 and recites the method thereof in which the step of selecting the scheduled time comprises the step of selecting the scheduled time from a preselected plurality of time slots. Claim 3 has been rejected on the teaching asserted with respect to claim 1 and further that *Miller* allegedly teaches a plurality of time slots. (Paper No. 8, page 3.) The teaching allegedly disclosing a plurality of time slots discloses that a content source notifies the scheduler of a desired delivery time that can be randomly occurring or periodically occurring and which is typically set by the content sources; these could represent the times when the replicated servers require data updates, for example. (See Paper No. 8, page 3) (citing *Miller*, column 6, lines 10-18). Thus, the teaching referred to does not disclose time slots, and in particular does not disclose time slots for resending a request. As *Miller* plainly teaches, this is a requested delivery time for delivering information from a content source to a replicated server. (*Miller*, column 6, lines 8-18.) Because *Miller* does not teach the identical invention of claim 3, claim 3 is not anticipated by *Miller* and is therefore allowable under 35 U.S.C. § 102 over *Miller*.

Claims 12 and 21, drawn, respectively, to a data processing system and a computer program product have been rejected on the same basis as claim 3 with respect to the limitations reciting selecting the scheduled time from a preselected plurality of time slots. (Paper No. 8, page 3.) Because, as discussed in conjunction with claim 3, *Miller* does not teach selecting time slots as recited in these claims, claims 12 and 21 are also allowable under 35 U.S.C. § 102 over *Miller*.

Claim 4 depends from claim 1 and recites the method thereof and including breaking a file requested in the network request into a set of subfiles in which the network request scheduled for resending includes a request to send a preselected subfile of the set of subfiles. *Miller* is alleged to teach breaking a file into subfiles or data frames. (Paper No. 8, page 3) (citing *Miller*, column 5, lines 19-23). As an initial matter, claim 4 does not recite breaking files into subfiles without more. Thus, the allegation on its face does not reach the limitation of claim 4. Note that anticipation requires that the prior art reference teach the identical invention as claimed, and it is indisputable that

where the allegation fails to allege that the prior art reference teaches all of the limitations of the claim, the burden of a *prima facie* showing of anticipation is not met. Additionally, claim 4 does not refer to data frames and the allegation with respect to breaking a file into data frames is not germane to a showing of anticipation with respect to claim 4. The foregoing notwithstanding, the teaching relied upon discloses that data transmitted from content sources typically takes the form of a plurality of data frames or data packets which together constitute a computer file. (*Miller*, column 5, lines 19-23.) Data frames or data packets would not be recognized by those of ordinary skill in the art to be subfiles. Data frames and data packets have an accepted meaning in the art. The Examiner provided any evidence whatsoever that a person of ordinary skill in the art would understand the data frames or data packets of *Miller* to be subfiles. For at least the aforesaid reasons, *Miller* has not been shown to teach the identical invention of claim 4, therefore *Miller* does not anticipate claim 4 and claim 4 is allowable under 35 U.S.C. § 102 over *Miller*.

Claims 13, 22 and 32 have also been rejected on the same basis as claim 4. (Paper No. 8, page 3.) Claims 13 and 22 are drawn, respectively, to a data processing system and a computer program product reciting operations that parallel the steps of method claim 4. Claim 32 is directed to the data processing system of claim 28 in which the server further includes circuitry operable for breaking the software asset as recited in claim 28, into a plurality of subfiles, and wherein the request for resending comprises a request for a preselected subfile of the plurality. Again, the teaching relied upon in *Miller* plainly does not disclose the limitations of claim 32. Because, *Miller* does not teach the identical invention of claims 13, 22 and 32, *Miller* does not anticipate claim 32. Therefore, claims 13, 22, and 32 are allowable under 35 U.S.C. § 102 over *Miller*.

Claim 5 is directed to the method of claim 1 and further including servicing the request in real time when resource capacity is available. Claim 5 has been rejected on the ground that *Miller* allegedly teaches real servicing of requests as emergency overage, highest priority or doing current transmissions. (Paper No. 8, page 3) (citing *Miller*, column 5, lines 57-58; column 6, lines 53-56; column 13, lines 27-30). The teachings relied upon disclose that the scheduler contains data relating to the pathway bandwidth, the percentage of bandwidth to be made available for content dated

transfer according to the time of day, emergency coverage bandwidth to be made available for content data transfer according to the time of day and the availability of multi-cast addresses; the priority level for each content source assigned based on some criteria such as a higher fee in return for being a quoted higher priority; and the granting of a content source the ability to transmit a greater amount of data than originally scheduled to transmit. (See Paper No. 8, page 3) (citing *Miller*, column 5, lines 57-58; column 6, lines 53-56; column 13, lines 27-30). Plainly, these teachings do not disclose servicing a requesting real time when resource capacity is available. Furthermore, *Miller* is directed to scheduling data transmissions. (*Miller*, column 1, line 16.) Thus, that *Miller* does not refer to servicing requests in real time when resource capacity is available is not surprising in view of the purpose of *Miller*. Because *Miller* has not been shown to teach the identical invention of claim 5, claim 5 is not anticipated thereby and is allowable under 35 U.S.C. § 102 over *Miller*. Claims 14 and 23 have been rejected on the same basis as claim 5. (Paper No. 8, page 3.) These claims are likewise not anticipated by *Miller* for at least the reasons discussed. Therefore, claims 14 and 23 are also allowable under 35 U.S.C. § 102 over *Miller*.

Claim 6 is directed to the method of claim 3 in which each time slot includes a first portion having a preselected proportion of a predetermined network resource capacity, the first portion comprising a portion reserved for servicing requests in real time. Claim 6 has been rejected on the same teachings in *Miller* relied upon in rejecting claim 5. As an initial matter, as discussed in conjunction with claim 3, *Miller* has not been shown to teach time slots as recited therein. Therefore, logically, *Miller* necessarily fails to teach time slots including a first portion having a first preselected proportion of a predetermined network resource capacity... . Likewise, as discussed in conjunction with claim 5, *Miller* has not been shown to teach servicing requests in real time and, plainly, the teachings relied upon as discussed in conjunction with claim 5 do not disclose a portion of a time slot having a preselected proportion of a predetermined network capacity comprising a portion reserved for servicing requests in real time. Therefore, *Miller* has not been shown to teach the identical invention of claim 6. Claim 6 is thus not anticipated by *Miller* and is allowable under

35 U.S.C. § 102 over *Miller*. Likewise, claims 15 and 24, rejected on the same basis as claim 6 are also allowable under 35 U.S.C. § 102 over *Miller*. (See Paper No. 8, page 3.)

Claim 7 depends from claim 3 and recites a method thereof in which each time slot includes a first portion having a first preselected proportion of a predetermined network capacity, the first portion comprising a portion reserved for servicing at least one scheduled request. Claim 7 has been rejected on the allegation that *Miller* teaches a portion of time reserved for certain requests. Again, as an initial matter, for the reasons discussed in conjunction with claim 3, *Miller* has not been shown to teach a plurality of time slots, and therefore, necessarily does not teach that each time slots and, therefore, necessarily cannot teach that each time slot includes a first portion having a first preselected proportion of a predetermined network resource capacity... . Notwithstanding this, however, the teaching that is asserted to teach a portion of time reserved for "certain" requests discloses that the scheduler determines for each content source a proportional bandwidth factor which relates to the ratio of the size of the data to be transmitted by each content source, respectively, to the total amount of data to be transmitted. (*Miller*, column 7, lines 15-19.) Plainly, this does not teach a portion of time reserved for "certain" requests. The Examiner also relies on teaching in *Miller* that states that the scheduler multiplies the pathway bandwidth by the percentage of bandwidth allocated to content data transfer. (*Miller*, column 8, lines 50-52.) Again, this does not, by the plain terms thereof, teach a portion of time reserved for "certain" requests. Additionally, claim 7 does not recite "certain" requests. Claim 7 recites that the first portion comprises a portion reserved for servicing at least one scheduled request. Anticipation requires that a single prior art reference teach the identical invention as recited in the claim. *Miller* has not been shown to do so. Therefore, claim 7 is allowable under 35 U.S.C. § 102 over *Miller*. Claims 16 and 25 have likewise been rejected on the same basis as claim 7. (Paper No. 8, page 3.) For at least the reasons discussed in conjunction with claim 7, claims 16 and 25 are also not anticipated by *Miller* and are allowable under 35 U.S.C. § 102 over *Miller*.

Claim 31 is directed to the data processing system of claim 28 in which the network comprises the Internet. The Applicants do not dispute that *Miller* describes that the network as

referred to therein may be the Internet. The network as recited in claim 31 is directed to the network as recited in claim 28 from which claim 31 depends. In other words, the network as recited in claim 31 must be arranged as required by the limitations of claim 28 from which claim 31 depends. Because, as discussed hereinabove in conjunction with claim 1, *Miller* has not been shown to teach a network as recited in claim 28, *Miller* does not teach the identical invention of claim 31 and therefore, does not anticipate claim 31. Thus claim 31 is also allowable under 35 U.S.C. § 102 over *Miller*.

### III. RESPONSE TO AMENDMENT

As an initial matter, the pertinence of the Examiner's response to the Applicants' Preliminary Amendment filed on March 17, 2003 (hereinafter "Preliminary Amendment") is unclear. The Examiner responds, apparently, to the Applicants showings in the Preliminary Amendment with respect to *Berstis, et al.*, U.S. Patent No. 6,115,745 ("*Berstis*") as applied to a rejection of claims 1-3, 10-12, 19-21 and 28-31 under 35 U.S.C. § 102. However, the Examiner has not repeated the rejection of these claims under 35 U.S.C. § 102 over *Berstis* in the instant Office Action, Paper No. 8. The Examiner is respectfully reminded that all the requirements outstanding against the Application should be noted in every Office Action. MPEP § 707.07(e). Thus, to the extent necessary, the Applicants hereby incorporate herein by reference the Applicants showings in the Preliminary Amendment with respect to the rejection of claims 1-3, 10-12, 19-21 and 28-31 over *Berstis* in Paper No. 5.

With respect to the Examiner's substantive response, the Examiner first addresses the Applicants showings in the Preliminary Amendment with respect to the allocating step of claim 1. (Paper No. 8, page 3) (citing Preliminary Amendment, page 5, lines 1-6). The Applicants showed that *Berstis* does not teach a step of allocating a scheduled time for resending the network request because *Berstis* teaches (as discussed further hereinbelow) that the client sets its own start time, and

therefore, it is illogical for the client to send a request to itself.<sup>1</sup> The Examiner responds that the agent or client (agents run on clients) since network requests based on notification of "given scheduling criteria distributed to the agent by the central authority" over the Internet "a plurality of Internet server machines" for "downloading clients software upgrades for fixes." (Paper No. 8, pages 3-4.) This assertion is plainly contradicted by the teachings of *Berstis* itself.<sup>2</sup>

*Berstis* is directed to a method for centralizing management of web agent schedules in a dial-up computer network environment. (*Berstis*, column 5, lines 3-5.) With the method each web agent determines its own start time in a pseudo random fashion within a time space defined by an agent load or weight table provided by ISP. (*Berstis*, column 5, lines 5-8.) The basic agent scheduling function is a routine that is run on each of the client machines incorporating the functionality. (*Berstis*, column 5, lines 24-26.) It is not required that all client machines connected to the ISP by the dial-up network run this routine, however, only those client machines that execute the function are load balanced across the connection. (*Berstis*, column 5, lines 26-30.) The process begins with the generation of a "map" of available agent start times. (*Berstis*, column 5, lines 39-32.) The "map" of possible start times is based on resource usage statistics and given scheduling criteria distributed to the agent by the central authority. (*Berstis*, column 5, lines 32-35.) (A map may be also referred to as an "agent load table" or a "weighted table." (*Berstis*, column 5, lines 39-40.) A particular start time is selected from the map, preferably at random, and this selected start time is then set as the "regular" or established start time for the agent. (*Berstis*, column 5, lines 41-45.) This start time is then used each time the agent is to initiate its activity (usually once per day). (*Berstis*, column 5, lines 45-47.) On dial-up, a test is run to determine whether the agent is able to obtain one of the limited number of network connections. (*Berstis*, column 5, lines 47-49.) Thus, there is

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<sup>1</sup> The Examiner's allegation, in fact, asserted that *Berstis* teaches allocating a scheduled time to process a data transfer request. (Paper No. 3, page 2) (Paper No. 5, page 2). This allegation fails on at least two counts. First, claim 1 does not recite a step of allocating a scheduled time to process a data transfer request. Thus, the Examiner's allegation does not address the claim limitation. Additionally, *Berstis* is directed to systems and methods for scheduling a dial-up connect to an Internet Service Provider. (*Berstis*, column 5, lines 3-5.) Thus, any "requests" sent by the client is for a dial-up connection, not a network request. Indeed, when the "request" is made, the client is not connected to the network at all. (See e.g., *Berstis*, column 4, lines 19-22) (stating that Internet client machines are connectable to a computer network ISP via a resource such as a dial-up telephone network).

nothing in the foregoing that teaches that an agent or client sends network requests based on notification of given scheduling criteria distributed by the central authority over the Internet to a plurality of Internet server machines for downloading client software upgrades or fixes.

Considering next, the "given scheduling criteria..." referred to by the Examiner, this "quotation" is taken out of the context of the agent's scheduling function just described, and refers to the generation of the map by the agent (which, runs on the client) based on resource usage statistics and given scheduling criteria distributed to the agent by the central authority. (See *Berstis*, column 5, lines 24-35.)

With respect to the network requests over the Internet to a plurality of Internet server "machines", this "quote" is pulled from the context of the discussion in *Berstis* describing the system in which the methodology of *Berstis* is implemented which states:

[a] representative system in which the present invention is implemented is illustrated in FIG. 1. A plurality of Internet client machines 10 are connectable to a computer network Internet Service Provider (ISP 12 via a "resource" such as a dial-up telephone network 14. As is well known, the [] dial-up network usually has a given, limited number of connections 16a-16n. ISP 12 interfaces the client machines 10 to the remainder of the network 18, which includes a plurality of Internet server machines 20.

(*Berstis*, column 4, lines 18-26) (emphasis added). Thus, the Examiner has simply clipped a snippet of text out of context to "manufacture" the alleged teaching with respect to sending network requests. Similarly, the "downloading clients software upgrades or fixes" is a snippet of text taken from teaching in *Berstis* discussing the use of a web agent for prefetching web content during off-line hours. (See *Berstis*, column 4, lines 54-65.) In that discussion, *Berstis* teaches that one agent function is downloading client software upgrades or fixes and installing them automatically. (*Berstis*, column 4, lines 63-64.)

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2 The Applicants respectfully object to the Examiner's improperly piecing together quotations taken out of context.

In view of the foregoing, there simply is no teaching in *Berstis* that supports the allegation that an agent or client sends network requests based on "notification of given scheduling criteria distributed to the agent by the central authority, over the Internet to a plurality of Internet server machines for downloading client software upgrades or fixes." (Paper No. 8, page 3.)

The Examiner also asserts that the Applicants suggests "if the outcome of a test to determine whether the agent is able to obtain one of a limited number of network connections, to initiate agent activity." (Paper No. 8, page 4.) The Examiner further contends that this is an incorrect and very limited reading of *Berstis*. The Examiner, true to form, quotes out of context and, with all due respect to the Examiner, mischaracterizes the Applicants showings in the Preliminary Amendment. The quotation referred to was in response to Examiner's allegations in rejecting claim 2 that *Berstis* taught selecting a notification of a time slot, to which the Applicants replied that the teaching referred to was discussing a map, or agent load table, and in particular that if the outcome of a test to determine whether the agent is able to obtain one of a limited number of network connection was positive, to initiate agent activity. (Preliminary Amendment, page 6.) The particular teachings in *Berstis* have been discussed hereinabove, but the Applicant will repeat, once again, to make clear what *Berstis* is teaching. Recall, the Examiner asserts that *Berstis* teaches selecting a notification of a time slot (citing to *Berstis* at column 5, line 40 and 50-52). (See Paper No. 3, page 3; Paper No. 5, page 3.) In context, the referred to teaching states:

FIG 2 is a flowchart illustrating the basic agent scheduling function. This particular routine is run on each of the client machines that incorporate this functionality. Of course, it is not required that all client machines connected to the ISP by the dial-up network connection run this routine; however, [] only those client machines that execute this function are "load balanced" across the connection. The routine begins at step 30 with a generation of a "map" of available agent start times. As will be described in more detail below, the "map" of possible start times is based on resource useage statistics and given scheduling criteria distributed to the agent by the central authority. The resource useage statistics are preferably derived from resource consumption by non-agent users. This enables the inventive technique to distribute agent load in a manner that does not interfere with the non-agent users. The "map" is sometimes referred to herein as an "agent load

table" or a "weighted table."

At step 32, a particular start time is selected from the map. Preferably, the start time is selected at random, although some more deterministic method may be used. At step 34, the selected start time is then set as the "regular" or established start time for the agent. This start time will then be used each time the agent is to initiate its activity (usually, once per day). At step 36, (typically upon dial-up), a test is run to determine whether the agent is able to obtain one of the limited number of network connections according to some given criteria as described in more detail below. If the outcome of the step of the test at step 36 is positive, the routine begins at step 38 with initiation of the agent activity.

(*Berstis*, column 5, lines 23-54.) Plainly, this teaching does not disclose selecting a notification of a time slot.

The Examiner further asserts that the Applicants' "suggestion" is not supported by *Berstis'* other teachings which teach "a test is made to determine whether updated use statistics have been received from the central authority... or a set of agent start times... the agent then selects an agent start time from the new map [preselected time slots]." (Paper No. 8, page 4) (citing *Berstis*, column 5, lines 66-67; column 6, lines 6-8). Note that the bracketed material "preselected time slots" does not appear in *Berstis*. Thus, the Examiner is not simply substituting a noun for its antecedent pronoun. The reference teaching in *Berstis* states:

At step 42, a test is made to determine whether updated use statistics have been received from the central authority since the last time the agent generated the map. If the result of the test at step 42 is negative, the routine continues at step 44 to retrieve a map that was generated previously and [then] saved. It then continues at step 48. If, however, the result of the test at step 42 is positive; the routine continues at step 46 with the agent generating a new map or set of agent start times. Step 46 may also be described herein as a regeneration of the map. At step 48, the agent then selects an agent start time from the new map. Preferably, this selection is also made at random.

(*Berstis*, column 5, line 66 through column 6, line 10.) Plainly, this teaching does not disclose the step of allocating a scheduled time including selecting the schedule time, and notifying

the client to resend the network request at the scheduled time, as recited in claim 2. As the Applicants have previously shown, it is illogical for a client to notify itself to resend a network request, and additionally, as previously discussed in the Preliminary Amendment and hereinabove, to the extent that *Berstis* teaches a "request" at all, it is a request for a dial-up connection in which circumstance there is no network connection yet established, by definition. (The teaching in *Berstis* with respect to "a particular start time is selected by the map" referred to by the Examiner has already been discussed hereinabove. (See Paper No. 8, page 4) (citing *Berstis*, column 5, line 41).

The Examiner further asserts that the Applicants arguments fail to comply with 37 C.F.R. § 1.111(b) with regard to claim 3 because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the cited portions of the reference and the relevant portions of the references. (Paper No. 8, page 4.) The Applicants respectfully disagree with the Examiner's allegation. Referring, for example, to the Preliminary Amendment, page 7, this plainly shows that the Applicants address the rejection of claim 3 noting, in part, that claim 3 has been rejected on the identical basis of claim 1, and then summarizing the showings made with respect to claim 1. The Applicants further noted that claim 3 depends from an allowable base claim or an intervening claim which itself depends from an allowable base claim. This is a sufficient showing of patentability in itself, as a matter of law as any claim depending from an allowable claim is necessarily allowable. The Examiner also states that "[c]learly, selecting a time slot is taught by *Berstis* by 'a test is made to determine whether updated usage statistics have been received from the central authority...or set of agent start times... and the agent then selects an agent start time from the new map [preselected time slots].'" (Paper No. 8, page 4) (citing *Berstis*, column 5, lines 66-67; column 6, lines 6-8). These teachings have previously been discussed hereinabove, and the statement by the Examiner that "selecting a time slot is clearly taught by *Berstis* is conclusory. The teachings of *Berstis* speak for themselves, and, as previously noted by the Applicants, the bracketed material does not appear in *Berstis*. As previously discussed, the "map" is a table of possible start times for establishing a dial-

up connection to an ISP by the agent, not a set of preselected plurality of time slots for selecting a schedule time for resending a network request, as in claim 3.

Anticipation requires that a single prior art reference teach the identical invention as recited in the claims. MPEP § 2131. This means that all of the limitations of the claim must be taught by the single prior art reference, and the limitations must be arranged as required by the claims. *Id.* For at least the foregoing reasons, anticipation of claims 1-3, 10-12, 19-21 and 28-31 by *Berstis* has not been established. Consequently, claims 1-3, 10-12, 19-21 and 28-31 are allowable under 35 U.S.C. § 102 over *Berstis*.

The Examiner also asserts that the limited structure claimed without more functional language reads on the references provided. (Paper No. 8, page 3.) The Applicants respectfully disagree. General allegations that the claim is too broad are not facts. Anticipation requires that a single prior art reference teach each and every limitation as set forth in the claim. M.P.E.P. § 2131. This requires that the claim be compared with the teachings of the reference and each and every element of the claim be found in the reference, arranged as required by the claim. *Id.* A statement that the structure claimed reads on the references provided, without more, is not the factual inquiry contemplated. *See* MPEP § 2131.

## VII. CONCLUSION

As a result of the foregoing, it is asserted by the Applicants that the remaining claims in the Application are in condition for allowance, and respectfully request an early allowance of such claims.

Applicant respectfully request that the Examiner call Applicants' attorney at the below listed number if the Examiner believes that such a discussion would be helpful in resolving any remaining problems.

Respectfully submitted,

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